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in the

Supreme Court

of the

United States

OCTOBER TERM, 1982

STATE OF MINNESOTA,

Petitioner,

versus

MARSHALL DONALD MURPHY,

Respondent.

ON WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

Brief of
The National Association of Criminal Defense Lawyers
As Amicus Curiae in Support of Respondent

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QUESTION PRESENTED

Whether when a probationer, under Court Order to be truthful to his probation officer and to report to his probation officer as directed, is interrogated by his probation officer about a prior crime and the probation officer knows that the answers will be incriminating and intends to pass the incriminating information on to the police, and the probationer requests an attorney which is denied, the request for counsel was an assertion of his Fifth Amendment privilege against self-incrimination so that statements made thereafter are inadmissible?

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Brief of The National Association of Criminal Defense Lawyers As Amicus Curiae in Support of Respondent

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers was founded a quarter of a century ago to

promote study and research in the field of criminal defense law, to disseminate and advance knowledge of the law in the field of criminal defense practice, to promote proper administration of criminal justice and to encourage the integrity, independence and expertise of the criminal defense practitioner. The members of the Association are criminal defense lawyers who devote the major portions of their professional lives to defending persons accused of crimes.

This case involves incriminating statements made by a probationer to his probation officer without *Miranda* warnings and after the probationer had requested a lawyer. It is the position of the National Association of Criminal Defense Lawyers that the decision of the Minnesota Supreme Court that the incriminating statements were inadmissible, was eminently correct for several very sound reasons, but especially because the probationer's request for a lawyer was an assertion of his Fifth Amendment privilege against self-incrimination.

As attorneys involved in the defense of criminal cases, the primary interest of the membership of the Association is to insure that fundamental rights are recognized and afforded all persons, including a probationer being interrogated by his probation officer under the specific circumstances presented in this case. The key issue to be decided, and the point which the National Association of Criminal Defense Lawyers will discuss in this brief is that when Murphy requested an attorney, the questioning should have ceased until counsel was made available to him.

Counsel for the respective parties have given their consent to the filing of this Amicus Curiae brief. Their letters of consent are on file with the Court.

SUMMARY OF ARGUMENT

The rule requiring truthful answers to a probation officer's questions without benefit of counsel, do not apply when the probation officer uses his authority to interrogate the probationer about an uncharged crime predating the current probation and unrelated to it. When the probation officer began talking about the 1974 rape and murder which the probationer had discussed with a psychologist at his treatment program, the probationer became angry and said that he felt like calling a lawyer. He was told that he could speak with an attorney later, and the questioning continued. When the probation officer delivered this preemptive strike against the probationer's assertion of his rights, she thwarted any further attempt on his part to assert his rights. Just two months before, the probation officer wrote the probationer a letter stating that if he did not contact her she would make an immediate request for a warrant. She reinforced in his mind that she could have his probation revoked. The probationer knew that if he left the office he could have been arrested for violation of probation.

The Fifth Amendment, through the Fourteenth Amendment, prohibits the State from compelling a suspect in custody to incriminate himself without first giving an adequate warning of rights. Once the probationer requested counsel, he asserted his Fifth Amendment right to remain silent until counsel was made available. All of the elements which require giving *Miranda* warnings

are present in this case including that the investigation focused on the probationer; the probation officer was acting in a police capacity; the probationer was in custody in that his freedom was restricted, he was not free to leave; his statements were compelled in that he did not feel that he could refuse to answer the probation officer's questions; it is undisputed that *Miranda* warnings were not given; and there was no waiver of rights—in fact the probationer asked to speak with a lawyer, thus trying to assert his rights. The meeting which allegedly was to discuss "further treatment" for the probationer was an investigation into a seven year old crime.

The probation officer abandoned her traditional role and became a police interrogator, knowing that she would learn incriminating information from the probationer and give it to the police to make a case. The rehabilitation function was totally negated. The Minnesota Supreme Court held that the probationer should have been advised of his privilege against self-incrimination. This holding should be upheld, and this Court should find that the denial of the request made by the probationer during questioning to speak with an attorney, renders his statements made thereafter inadmissible under *Edwards v. Arizona*, 451 U.S. 477 (1981) and *Miranda v. Arizona*, 384 U.S. 436 (1966). Cf. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

ARGUMENT

WHEN A PROBATIONER, UNDER COURT ORDER TO BE TRUTHFUL TO HIS PROBATION OFFICER AND TO REPORT TO HIS PROBATION OFFICER AS DIRECTED, IS INTERROGATED BY HIS PROBATION OFFICER ABOUT A PRIOR CRIME AND THE PROBATION OFFICER KNOWS THAT THE ANSWERS WILL BE INCRIMINATING AND INTENDS TO PASS THE INCRIMINATING INFORMATION ON TO THE POLICE, AND THE PROBATIONER REQUESTS AN ATTORNEY WHICH IS DENIED, THE REQUEST FOR COUNSEL WAS AN ASSERTION OF HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION SO THAT STATEMENTS MADE THEREAFTER ARE INADMISSIBLE.

References in this brief to documents in the original record and to transcripts of proceedings before the trial court will be made as they appear in the Appendix to the Petition for Certiorari filed by the State of Minnesota, by appendix letter and page number.

The facts are adequately set forth in the brief of Respondent and will not be repeated herein with the exception of the following: The order placing Murphy on probation required him to (C-32): "Be truthful to your Probation Officer in all matters" and "Report to your Probation Officer as directed."

> Should defendant violate any of the conditions herein specified, or should it hereafter satisfactorily appear that sentence should be enforced, said stay may at any time prior to expiration [be] revoked and sentence executed.

* * *

In July of 1981, it came to the probation officer's attention that Murphy was no longer in treatment. She sent him a letter asking him to contact her immediately (C-7). The letter stated that failure to do so would result in an *immediate request for a warrant* (C-35). Murphy called and they arranged a meeting (C-8). At that meeting, Murphy said that he did not want to continue treatment. The probation officer acquiesced and said that she *would not seek to have Murphy's probation revoked on that ground alone* because he was employed and seemed to be doing well in other areas (C-14). Murphy was well aware of his probation officer's power to request a warrant and revoke his probation.

In September, the probation officer learned from a psychologist at Murphy's treatment program that Murphy admitted to the commission of a rape and murder in 1974 (C-15). The probation officer sent Murphy a letter stating that she wanted to discuss his further treatment plans. If he did not respond, his conditions of probation would have been violated (C-25-27):

> Q. When you went into the office then on September 28, what did you think you were going to be talking about?

A. Further treatment plans.

Q. What was your reaction when your probation officer told you about the information she had received that we talked about yesterday?

A. I was, you know, shocked and angry.

Q. Did the subject of an attorney come up?

A. I asked her if—well, I said I feel like I should have an attorney present.

Q. Why did you feel like you should have an attorney present?

A. Well, the subject matter we were talking about, little flags went up in my head, and you know, I felt like I needed an attorney at the time.

Q. And what was Mara's demeanor right after you said that?

A. She seemed like kind of angry and frustrated.

Q. What did she say to you?

A. She said we didn't have to worry about having an attorney here now. We had more important things to talk about.

Q. What was that she wanted to talk about?

A. About the case at hand.

Q. Did you feel you were free to leave at that time?

A. No. I didn't.

Q. What did you think would happen if you left at that time?

A. Well, if I would have got up and walked out of the office, I would have been violated. [Conditions of probation would have been considered violated.]

Q. Did you want to talk to her about further treatment at that time?

A. No.

* * *

Q. Why did you then continue to talk to her at that time?

A. She wanted to talk to me.

* * *

The probation officer had already discussed with her supervisor the information which she received from the psychologist, and she knew, before Murphy came to her office, that she was going to question Murphy about the crimes and pass the information on to the police (C-15, 16). She did not advise him of this before questioning him (C-24). Her directive for Murphy to report to her office was couched in terms of "further

treatment" (C-16). The probation officer became a de-facto police interrogator, rather than a social worker concerned with the rehabilitation of her charge. Murphy testified that it did not occur to him that the probation officer would take the information to the police, and she did not tell him that until after they had finished their discussion. At the time they started talking, Murphy did not know that he had the right to remain silent, or the right to consult with an attorney (C-28).

Based on the foregoing facts, the Minnesota Supreme Court held (A-10):

> Because of the compulsory nature of the meeting, because defendant was under court order to respond truthfully to his agent's questions, and because the agent had substantial reason to believe that defendant's answers were likely to be incriminating, we conclude that, as a matter of federal constitutional law, any failure on defendant's part to claim the privilege when he was questioned does not bar his later reliance on the privilege in seeking suppression of his confession. Stated differently, we conclude that, as a matter of due process, the agent should have warned defendant of his privilege against compelled self-incrimination before she questioned him and that her failure to do so, when she had already decided to report his answers to the police, bars use of defendant's confession at his trial.

A. THE PROBATION OFFICER ABANDONED HER ROLE AND CONDUCTED A POLICE INTERROGATION DURING WHICH MURPHY WAS ENTITLED TO COUNSEL.

Ordinarily, the probation officer's function is to investigate the circumstances surrounding the offense and the background of the probationer, as well as to supervise the probationer's lifestyle while on probation. *Miranda* warnings usually are not required to be given by the probation officer, but as the Minnesota Supreme Court recognized, special aggravating circumstances warrant an exception in this case.

The probation officer was acting as an officer of the State when she compelled Murphy's attendance in her office on September 28, 1981. She confronted him with the information from the psychologist, and proceeded to engage in questioning obviously for the purpose of eliciting incriminating information, knowing that she would share that information with the police. This was not just routine questioning as an adjunct to her normal duties of probation supervision. It was not an ordinary interview to learn the background of the probationer, nor was it an investigation into some incident occurring during the period of probation which could lead to revocation of probation.

Certainly, effective supervision requires questioning probationers about their present activities and lifestyle while on probation. Sometimes that questioning may lead to incriminating information. The point is well taken, that requiring *Miranda* warnings before every contact between probation officer and probationer would hamper the administration of probation supervision.

But it is beyond the scope of probation supervision to investigate pre-probation crimes with intent to prosecute the probationer. See *Estelle v. Smith*, 451 U.S. 454 (1981).

When the probation officer assumed the role of police investigator, the probation relationship evaporated and an interrogator-suspect relationship developed. To hold as the State urges the Court to hold, would allow the police to use probation officers to do their questioning when a probationer is suspected of a crime. Due to the trust and confidence implicit in the relationship, the probation officer could more easily obtain a confession without having to give *Miranda* warnings. The probationer would have to appear as directed and would have to answer all questions truthfully, knowing that although he may be physically "free to leave", if he does leave, the probation officer will have him arrested and have his probation revoked.

Just as the decisions in *Escobedo v. Illinois, supra*, and *Miranda v. Arizona, supra*, 384 U.S., 477, are "not intended to hamper the traditional function of police officers in investigating crime", neither will approval of the decision of the Minnesota Supreme Court in this case hamper the normal function of probation officers to supervise and rehabilitate probationers.

To summon Murphy to the office using the subterfuge of discussing "further treatment" to elicit a confession to a pre-probation crime is reminiscent of the schemes employed by the police to throw the suspect off guard by assuming a non-adversary position. See White, *Police Trickery in Inducing Confessions*, 127 Pa.L.R. 581, 599, 628 (1979). The notion of a state agent instructing a probationer to report to the office to discuss further

treatment and then making him confess to a crime, is unacceptable. She induced Murphy to lower his guard. She took him by surprise and exacerbated his confusion and bewilderment by forcing him to discuss the rape and murder in the context of its relationship to the offense for which he was on probation.

In *Leyra v. Denno*, 347 U.S. 556 (1954), defendant was induced by a state-employed psychiatrist to confess to the murder of both of his parents. Defendant had been suffering from a painful sinus attack and thought the doctor was a general practitioner brought in to give him medical relief. This may be analogized to the way Murphy was thrown off guard when the probation officer told him he must discuss this crime in terms of further treatment. The probation officer was acting on behalf of the State, not in the best interest of Marshall Murphy.

In *Fare v. Michael C.*, 442 U.S. 707, 720-721 (1979), in dicta, the Court explained the roles of probation officers and their dual responsibilities to probationers and to the state:

> . . . the probation officer is the employee of the State which seeks to prosecute the alleged offender. He is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace officers. He owes an obligation to the State, notwithstanding the obligation he may also owe the [probationer] under his supervision.

* * *

> . . . it cannot be said that the probation officer is able to offer the type of independent advice that an accused would expect from a lawyer retained or assigned to assist him during questioning. Indeed, the probation officer's duty to his employer in many, if not most cases would conflict sharply with the interests of the [probationer]. For where an attorney might well advise his client to remain silent in the face of interrogation by the police, and in doing so would be "exercising" [his] good professional judgment . . . to protect to the extent of his ability the rights of his client, *Miranda v. Arizona*, 384 U.S. at 480-481, a probation officer would be bound to advise his charge to cooperate with the police.

Probation officers, like police officers, enjoy broad power to exercise coercive force over individuals under their supervision, including the power both to arrest and to release those over whom they have jurisdiction. Probation officers have ". . . been armed with the power to recommend or even to declare revocation." *Gagnon v. Scarpelli*, 411 U.S. 778, 784 (1973). The probation officer is an extension of the judiciary's authority to set the conditions under which particular individuals lead their lives and of the executive's authority to coerce obedience to those conditions. The probation relationship has an almost familial kind of privacy and confidentiality attached to it. The probation officer is an authority figure. In that capacity, the probation officer has the power to compel a probationer to confess and to do so involuntarily.

In July of 1981, when the probation officer learned that Murphy was no longer in treatment, she wrote him a letter asking him contact her immediately. His failure to do so would have resulted in an *immediate request for a warrant.* When they met in July, the probation officer told Murphy that she would not seek to have his probation revoked because he was employed and was doing well. This served to reinforce in Murphy's mind the awesome power held over him by the probation officer to request a warrant and revoke probation at her discretion. She had police power over Murphy. Her questioning was an interrogation and he was in custody in that he was instructed to come to the office or be arrested. He was in a vulnerable position. She had threatened him once before with a warrant, and he knew what she could do to him if he failed to cooperate.

It is the extent of the power which the probation officer held over Murphy which made this interrogation even more menacing than one in a police station. Interrogation in police custody is, without doubt, menacing. A police officer wields great power over his suspect when he wants answers to questions. Although the power of the probation officer is different from the direct, immediate, primitive powers of a police officer interrogating a suspect in his squad car at 3:00 a.m., it is as devastating. The probation officer could allow Murphy to remain free on probation, or she could have him arrested and his probation revoked, depending upon whether he cooperated to her satisfaction. This was prominent in his mind. Thus, the interrogation here was more menacing that it would have been in a police-suspect context. Cf. Y. Kamisar, *Police Interrogation and Confessions*, at 195 (1980).

In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Court ruled that incriminating statements made by several police officers were improperly used to convict the officers of conspiring to obstruct justice. When the questioning commenced, the officers were advised that they would be fired if they refused to answer. As Mr. Justice Douglas wrote at 385 U.S. 497-8:

> The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in Miranda . . . is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice." We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions. (citations omitted)
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> * * *
>
> **The protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office. 385 U.S. at 500.**

The application of this holding to the instant situation is plain. *Garrity* dealt with the loss of employment as a penalty for refusal to answer. Murphy was faced with immediately being taken into custody and having his probation revoked for failure to "be truthful to [his]

probation officer in all matters". It is ineluctable that the loss of a job while a dreadful penalty for refusing to answer questions, is far outweighed by the loss of freedom. See also *Spevack v. Klein*, 385 U.S. 511 (1967).

This case may be distinguished from *Oregon v. Mathiason*, 429 U.S. 492 (1977). Mathiason was not required by court order to go to the state patrol office in response to the officer's note stating "I'd like to discuss something with you." Mathiason went voluntarily, but Murphy was required to meet with his probation officer or be in violation of conditions of probation. This was such restriction on Murphy's freedom as to render him "in custody" for purposes of *Miranda*. This case is also distinguishable from *Beckwith v. United States*, 425 U.S. 341 (1976). At least Beckwith was told that the investigation concerned possible criminal violations and that he could not be compelled to answer. Further, the interview was friendly and relaxed and took place at Beckwith's home. These facts do not obtain here.

Even inmates summoned to prison disciplinary hearings must be offered "whatever immunity is required to supplant the privilege" and cannot be requested to waive that immunity, if their testimony might incriminate them in later criminal proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 85 (1973). Compare *Baxter v. Palmigiano*, 425 U.S. 308, 319-20 (1976), in which an *adverse inference* could be drawn from an inmate's silence at prison disciplinary proceedings. Here, there was far more than inference; Murphy knew he would have to go to jail for his refusal to answer.

The probation officer held at least as much power over Marshall Murphy in this case, as the narcotics

officers held over Mark Royer at Miami International Airport in *Florida v. Royer*, 103 S.Ct. 1319 (1983). In *Royer*, all the officers held was Royer's airline ticket and his drivers license. This was found to constitute custodial interrogation under the totality of the circumstances approach. The probation officer held Murphy's freedom in her hands. In *Orozco v. Texas*, 394 U.S. 324, 326 (1969), the defendant was interrogated at the boarding house where he lived, in his own bed and in familiar surroundings. Still, he was not free to leave. The use of his incriminating admissions obtained in the absence of the required warnings was held to be "a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda*". Ibid.

The probation officer was on ethically treacherous ground. It is unrealistic to expect that a probation officer can rehabilitate a sex offender if the offender cannot freely relate his background and personal history to the probation officer, knowing that what he says will be held in confidence; it is also unrealistic to expect that a sex offender can benefit from a treatment program if he has to fear that disclosures to a therapist will result in prosecution on criminal charges. Without the confidence of both the treatment program and the probation officer, the rehabilitation function cannot be successfully carried out. See, Stone, *The Tarasoff Decision: Suing Psychotherapists to Safeguard Society*, 90 Harv. L.R. 358 (1976). When the probation officer began investigating the crime, she should have advised Murphy of his rights and in any event, should have honored Murphy's request to speak with a lawyer.

To reverse the decision of the Minnesota Supreme Court will serve to give probation officers power which is destructive of rehabilitation and destructive of Fifth Amendment rights.

B. MURPHY'S REQUEST FOR AN ATTORNEY WAS AN INVOCATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

The trial judge recognized that Murphy asserted "that this request for counsel was an invocation of the privilege against self-incrimination" (B-6), but found that Murphy's request for a lawyer was made solely in the context of a civil suit for breach of confidentiality. The trial judge did not decide whether Murphy's reference to a lawyer constituted an assertion of the privilege. It found that Murphy was not in custody and that the confession was voluntary (B-6-14), but made no reference to any legal standards regarding what constitutes an assertion of the privilege under the self-incrimination clause.

The finding with respect to a civil suit was clearly erroneous. The Court made no finding about what Murphy's "real intent" was when he asked for a lawyer (B-13, 14):

> He now claims that he asserted a right to talk to an attorney, and whatever his real intent may have been, we are persuaded by the probation officer's testimony that he did not express that desire in any context other than a civil suit for the breach of confidentiality.

The trial court did not say that based upon all of the circumstances Murphy was only concerned about a civil suit. It was just "persuaded by the probation officer's testimony" that Murphy asked for a lawyer solely in the context of a civil suit. As the testimony

reflects, the only person in the courtroom who referred to a civil suit was the prosecutor (C-20-21):

Q. You indicated that at one point Marshall Murphy made mention of he ought to see a lawyer?

A. Yes.

Q. Am I correct that that was in the context,—Mr. Wernick: Objection, leading.

The Court: Well, it sounded like it would have been, but I guess we won't know unless he asks it. Well, go ahead and ask it.

By Mr. Lynn:

Q. Was that in the context of a civil lawsuit? Mr. Wernick: Well, objection, leading and a legal conclusion.

The Court: Well, I don't have the whole question before me.

Mr. Lynn: I will rephrase it, Your Honor.

By Mr. Lynn:

A. You indicated that Marshall Murphy became angry correct?

A. Correct.

Q. He said something about a lawyer, is that correct?

A. That's correct.

Q. Do you recall specifically what he said?

A. Yes, he said that he was so angry that the information about his admission to the rape and murder had been given to me that he felt like calling a lawyer. He felt that that violated his confidentiality.

The Minnesota Supreme Court made the following factual finding (A-3):

> The agent apparently opened the meeting by telling defendant about the information which she had received from the counselor and then said that she now felt that defendant needed treatment. Defendant became angry when he learned this. He stated that he felt his confidences had been breached by the disclosure and that he felt like calling an attorney.

The Court specifically stated that it was not deciding whether Murphy asserted the privilege (A-9).

> We need not decide whether defendant in fact claimed the privilege in this case because we conclude that an exception must be made on the facts of this case to the general rule requiring a timely claim of the privilege.

The issue has been raised and preserved in the courts below, but it has not yet been addressed directly. It is an important question which should be decided by this Court.

Garner v. United States, 424 U.S. 648, 653-4 (1976), holds that the self-incrimination clause limits the power of the government to use compulsory process when the information sought is incriminatory in nature and the individual objects to the government seeking the information. A timely assertion of the privilege must be honored. *Garner, supra; Quinn v. United States*, 349 U.S. 155 (1955). The probation officer knew that the information she sought to elicit from Murphy was incriminating. The sole purpose for which she summoned him to her office was to obtain a confession to the crimes so that he could be prosecuted. This was clearly beyond the scope of the probation rules which appear to waive the right against self-incrimination. Even if the probation officer had advised Murphy of his rights, in order to limit her power to compel answers Murphy only had to put her on notice that he objected to being questioned about the murder. This is no battle of wills or game of semantics. When the right to call an attorney was asserted, that should have been the end of the questioning. First, Murphy expressed anger that she brought the subject up. He did not want her to know that he had admitted to committing a murder and did not want to discuss it. Second, he stated that he felt like calling a lawyer. At this point, the self-incrimination clause was invoked and the probation officer had no lawful authority to further question him about a substantive crime which would not be a violation of probation. In the alternative, the officer could compel answers if needed for a treatment plan, but not use the information against the probationer in a new prosecution.

In *Rhode Island v. Innis*, 446 U.S. 291 (1980), the Court referred to the undisputed right under *Miranda* to remain silent and to be free of interrogation until

the defendant could consult with a lawyer; and in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 1884-5 (1981), the Court held that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he was advised of his rights. Once having expressed a desire to deal with the police only through counsel, defendant is not subject to further interrogation by the authorities until counsel has been made available to him.

Asking for a lawyer is a stronger assertion of the privilege than merely invoking the right to remain silent. Compare *Edwards, supra*, to *Michigan v. Mosely*, 423 U.S. 96 (1975). In *Mosely*, defendant was readvised of his rights and questioned again; but when Edwards asked for a lawyer, questioning had to cease until counsel was made available.

The request for an attorney is *per se* an invocation of the Fifth Amendment privilege. In *Fare v. Michael C., supra*, the Court discussed the critical position held by lawyers in the legal system, and the unique ability of lawyers to protect the Fifth Amendment rights of their clients undergoing custodial interrogation (442 U.S. at 707):

> The *per se* aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country . . . the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease.

It is, of course, the primary concern of the National Association of Criminal Defense Lawyers that persons accused of crimes being questioned in custodial situations, be accorded the right to speak with their attorneys. The presence of an attorney is the most effective means of minimizing the disadvantage at which an accused is placed when he is directly confronted with the awesome law enforcement machinery of the State.

Murphy did invoke his right to counsel. Assuming he did not, the probation officer's comment that he would have to wait to speak with an attorney made it clear that he could not have one, even if he asked again. What the probation officer told Murphy was fatal to any incriminating statements he made.

C. THE PROBATION OFFICER MADE IT CLEAR TO MURPHY THAT HE COULD NOT HAVE AN ATTORNEY AND THAT HE HAD NO RIGHT TO REMAIN SILENT.

Murphy said he felt like calling a lawyer. The probation officer, angry and frustrated, said he did not "have to worry about having an attorney" at that time and that they "had more important things to talk about". This statement was the antithesis of advising him of his rights. The probation officer, in effect, told Murphy that he had no rights and could not assert any rights during the meeting (under penalty of alienating her to the extent that she would have his probation revoked). She delivered a preemptive strike, cutting off any possibility that Murphy would attempt to (further) assert his rights while he was in the office.

Telling Murphy that he had to discuss the rape and murder in the context of treatment and its relationship to the present offense was the equivalent of saying "You have no rights here now". Murphy was like the immunized witness in *New Jersey v. Portash*, 440 U.S. 450 (1979), whose statement was held to be involuntary because he was told that he could not call an attorney and thus, he had no Fifth Amendment right to remain silent.

Had the probation officer opened the meeting by telling Murphy that he could not see an attorney until after she finished questioning him, there would be no doubt that she was precluding any assertion by Murphy of his rights. When she said it in response to his request for counsel, she cut off any remaining defenses he might have tried to use to avoid making incriminatory statements. If, as we believe, he wanted an attorney to protect his Fifth Amendment rights, she thwarted this. Even if he asked for an attorney for purposes of a civil action for breach of confidence, she thwarted any later assertion of right to counsel or right to remain silent.

Assuming there was no absolute barrier in this situation against questioning without giving *Miranda* warnings, the course of events required the protection of Murphy's rights. He did not make an unsolicited visit to the office to volunteer the information. He was summoned to appear. When she confronted him with the information, he said he needed a lawyer. She said he could not see a lawyer (for any purpose) until he left her office. It would be unrealistic to expect him to assert his rights further. After all, the probationer is dependent on maintaining the good will of his probation

officer. She has complete control over him. She decides whether he remains free or goes to jail. If Murphy had *demanded* to speak with an attorney, after being told he would have to wait, he might well have lost her good will.

In *Quinn v. United States*, supra, 349 U.S., 161-2, the Court wrote that the privilege of self-incrimination is:

> ". . . a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions." Co-equally with our other Constitutional guarantees, the Self-Incrimination Clause "must be accorded liberal construction in favor of the right it was intended to secure."

There is no value in having a Constitution if the government can prevent the people from knowing and exercising their rights under it.

> . . . no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

Escobedo v. Illinois, 378 U.S. at 490. The existence of constitutional rights in a vacuum is worthless. It is their application and availability to individuals that impart meaning to them. Constitutional rights are of no value if the public is not aware and given benefit of them. A defendant cannot waive a right he does not know he has. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

CONCLUSION

The decision in *Miranda* transformed the climate of station house interrogation, putting an end to a sordid history marked by the use of trickery and torture as a means of coercing confessions against the human will. *Miranda* introduced a more civilized standard of interrogation. To recede even slightly from the standards set out in *Miranda*, will serve to encourage greatly those who would chip away at our Constitutional rights until they are effectively nonexistent. The National Association of Criminal Defense Lawyers is not suggesting that *Miranda* warnings must be given before every contact between probation officer and probationer. We appreciate the importance of probation as a viable alternative to incarceration. We do contend, however, that under the circumstances of this case, *Miranda* warnings were required to be given, and when Murphy requested to speak with counsel, questioning should have ceased, as he had asserted his Fifth Amendment rights. The decision of the Minnesota Supreme Court should be affirmed.

Respectfully submitted this 24th day of May, 1983.

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